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Sin Chuan Aik Brothers Realty Sdn Bhd v Inti Higher Learning Centre Sdn Bhd

B HIGH COURT (KUALA LUMPUR) — CIVIL SUIT NO S3–22–03 OF 1993
MOHD HISHAMUDIN J
22 JANUARY 2008

C *Civil Procedure — Parties — Locus standi — Agent of registered proprietor of building — Appointed to rent out, collect rent and manage building — Power of attorney given by registered owners to agent — Whether agent had locus standi to commence action in its own name*

D

The plaintiff was a company appointed as an agent by the registered proprietors of a building known as 'Wisma SCA' to rent out, collect rent and manage the said building. The defendant was a private educational institution
E who intimated to the plaintiff that it was interested to rent Wisma SCA to be used as its private college. Although the parties were in agreement as to the amount of the monthly basic rental, they were unable to agree on the formula to be used to compute the monthly commission rental. So the parties carried out negotiations to work out a formula that would be acceptable to both
F sides. On 1 April 1988 the defendant had moved in and later even took over another floor while the terms were still being negotiated. On 24 April 1990 and 16 July 1990 the defendant's solicitors wrote to the plaintiff's solicitors asking whether the plaintiff intended to execute the tenancy agreement. However, there was no response from the plaintiff. Finally on 16 March 1991
G the defendant served a notice to the plaintiff terminating the rental of Wisma SCA with effect from 15 April 1991. On 15 April 1991 the defendant vacated the premises. The plaintiff claimed against the defendant for an alleged breach of a tenancy agreement between the parties for the rental of Wisma SCA. The defendant counterclaimed against the plaintiff for a sum of
H RM57,000 as a return of the deposit paid. The basis of the counterclaim was that the defendant did not breach the agreement it had with the plaintiff and was therefore entitled to the return of the deposit. The defendant's main issue was whether in the light of the power of attorney the plaintiff could bring this action in its name instead of in the name of the registered owners.

I

Held, dismissing the plaintiff's claim and the defendant's counterclaim with costs:

(1) The power of attorney did not empower the plaintiff to commence this

action in its own name. In fact this was admitted by the plaintiff itself in cross-examination. Hence, it had no locus standi (see paras 14–15).

(2) In law the landlord need not have to be the registered proprietor and in the present case, legally, the plaintiff could be the landlord in respect of the tenancy of the premises. However, on the evidence it appeared that the plaintiff was negotiating with the defendant not in their own right as the purported owner and the prospective landlord of Wisma SCA but as the agent or attorney of the registered owners. The draft tenancy agreement stated that the tenancy agreement was between the five registered owners (instead of the plaintiff) and the defendant. This was a strong evidence to show that the plaintiff did not have in mind to be the landlord in the proposed tenancy. The plaintiff was constantly conscious of the existence of the power of attorney and, indeed, had even exhibited the power attorney as evidence at the trial (see para 22).

(3) Since the defendant had taken the position that in law the landlord-tenant relationship existed only between the registered owner (not the plaintiff) and the defendant, therefore, consistent with this position taken the defendant must sue the registered owners (and not the plaintiff) for the return of the deposit (see para 24).

[Bahasa Malaysia summary

Plaintif adalah sebuah syarikat yang dilantik sebagai ejen oleh pemilik-pemilik berdaftar sebuah bangunan yang dikenali sebagai 'Wisma SCA' untuk menyewakan, mengutip dan menguruskan bangunan tersebut. Defendan adalah sebuah institusi pendidikan swasta yang telah memaklumkan kepada plaintif bahawa ia berminat untuk menyewakan Wisma SCA untuk digunakan sebagai kolej swasta. Walaupun pihak-pihak bersetuju dengan amaun penyewaan asas bulanan, tetapi mereka tidak dapat bersetuju dengan formula untuk digunakan untuk mengira komisyen sewaan bulanan. Dengan itu pihak-pihak telah menjalankan perundingan untuk mendapatkan satu formula yang dapat diterima oleh kedua-dua pihak. Pada 1 April 1988 defendan telah berpindah masuk dan seterusnya juga telah mengambil alih satu lagi tingkat sementara terma-terma masih dirundingkan. Pada 24 April 1990 dan 16 Julai 1990 peguamcara defendan telah menulis kepada peguamcara plaintif dan menanya sama ada plaintif masih berhasrat untuk menandatangani perjanjian penyewaan. Walau bagaimanapun tiada balasan daripada plaintif. Akhirnya pada 16 Mac 1991 defendan sampaikan satu notis kepada plaintif menamatkan penyewaan Wisma SCA bermula dari 15 April 1991. Pada 15 April 1991 defendan mengosongkan premis tersebut. Plaintif menuntut terhadap defendan untuk kemungkiran perjanjian penyewaan di antara pihak-pihak untuk penyewaan Wisma SCA. Defendan menuntut balas terhadap plaintif untuk wang sejumlah RM57,000 sebagai

A pemulangan deposit yang telah dibayar. Asas tuntutan balas ialah bahawa defendan tidak memungkiri perjanjian yang ditandatangani dengan plaintif dan dengan itu berhak kepada pemulangan deposit tersebut. Isu utama defendan ialah sama ada memandangkan terdapat surat kuasa wakil, plaintif berhak memulakan tindakan tersebut atas namanya sendiri dan bukan atas B nama pemilik-pemilik berdaftar.

Diputuskan, menolak tuntutan plaintif dan tuntutan balas defendan dengan C kos:

(1) Surat kuasa wakil tidak memberikan kuasa kepada plaintif untuk memulakan tindakan ini atas namanya sendiri. Sebenarnya fakta ini diakui oleh plaintif sendiri ketika soal-balas. Dengan itu, ia tidak mempunyai locus standi (lihat perenggan 14–15).

D

(2) Mengikut undang-undang tidak perlu bagi tuanpunya tanah menjadi pemilik berdaftar dan dalam kes ini, mengikut undang-undang, plaintif juga boleh menjadi tuanpunya tanah berhubungan dengan penyewaan premis-premis tersebut. Walau bagaimanapun, atas keterangan ia E nampak seperti plaintif berunding dengan defendan bukan atas hak mereka sendiri sebagai bakal pemilik dan sebagai bakal tuanpunya Wisma SCA tetapi sebagai ejen atau wakil pemilik-pemilik berdaftar. Draf perjanjian penyewaan menyatakan bahawa perjanjian penyewaan adalah di antara kelima-lima pemilik berdaftar (dan bukannya plaintif) dan defendan. Ini adalah bukti yang kuat untuk menunjukkan bahawa F plaintif tidak terfikir untuk menjadi tuanpunya tanah dalam penyewaan yang dicadangkan tersebut. Plaintif pada setiap masa peka akan kewujudan surat kuasa wakil dan, telah melampirkan surat kuasa wakil sebagai bukti semasa perbicaraan (lihat perenggan 22).

G (3) Memandangkan defendan telah menganggap bahawa dari segi undang-undang perhubungan tuanpunya tanah dan penyewa wujud hanya di antara pemilik berdaftar (dan bukannya plaintif) dan defendan, dengan itu, konsisten dengan anggapan ini defendan harus mengambil tindakan terhadap pemilik-pemilik berdaftar (dan H bukannya plaintif) untuk pemulangan wang deposit tersebut (lihat perenggan 24).]

Notes

For cases on locus standi, see 2(2) *Mallal's Digest* (4th Ed, 2007 Reissue) I paras 5082–5102.

Cases referred to

Hartecon JV Sdn Bhd v Hartela Contractors Ltd [1996] 2 MLJ 57 (refd)
J Selvam & Anor v S Mehta & Anor v S Mehta & Anor [1981] 2 MLJ 45 (refd)

Legislation referred to

Rules of the High Court 1980 O 18 r 19

Balwinder Singh (Kumar Partnership) for the plaintiff.
Gopal Sreenevasan (Sivananthan) for the defendant.

Mohd Hishamudin J:

[1] This case was originally heard before Hashim Yusof J (as he then was). At the commencement of the hearing, before the trial could proceed the defence raised a preliminary objection. After hearing submissions, the learned judge dismissed the preliminary objection and ordered the case to proceed to trial. The case then was adjourned to another date for the trial. However, before the trial date, Hashim Yusof J was transferred to another court. When I subsequently took over conduct of this case on 24 December 2003, it was agreed by parties that I should hear this case *de novo*.

[2] The plaintiff in the present case is a company duly appointed as an agent by the registered proprietors of a building known as 'Wisma SCA' to rent out, collect rent and manage the said building.

[3] The defendant is a private educational institution running a private college at Wisma Sim Lim in or about early 1988, and was considering alternative premises for its private college.

[4] The defendant intimated to the plaintiff that it was interested to rent Wisma SCA to be used as its private college. There was a meeting between the representatives of both sides. On 12 February 1988 the plaintiff issued a letter of offer setting out the terms of which the plaintiff was willing to rent out the second floor of Wisma SCA. On 1 April 1988 the defendant moved in into the second floor of Wisma SCA. But at that stage the formal tenancy agreement was yet to be finalised. However, in principle parties were in agreement that the monthly rentals were to comprise of two elements (or components), namely:

(1) the basic rental; and

(2) the commission rental.

[5] The parties were in agreement as to the amount of the monthly basic rental. The parties also were able to agree that the monthly commission rental was to be linked to the gross monthly revenue of the defendant. But parties found it difficult to agree on the formula to be used to compute the monthly commission rental. So the parties carried out negotiations to work out a formula that would be acceptable to both sides. On 27 June 1989 (do note

A that this more than a year after the defendant had occupied the second floor of Wisma SCA) the plaintiff forwarded a copy of the draft tenancy agreement to the defendant. On 22 September 1989 the defendant's solicitors returned the draft tenancy agreement to the plaintiff with amendments. While parties were still in the midst of negotiating to arrive at an agreed formula for B determining the monthly commission rental, the plaintiff, on 19 August 1989 wrote to the defendant offering the renting of the 3rd floor in the terms as set out in the letter. The defendant accepted the offer and on 1 November 1989, the defendant occupied the third floor of Wisma SCA. But the parties were yet to arrive at an agreed formula on the computation of the monthly C commission rental. On 23 February 1990 the plaintiff wrote to the defendant setting out the terms of offer for the rental of the third floor. Then on 24 April 1990 the defendant's solicitors wrote to the plaintiff's solicitors asking whether the plaintiff intended to continue with the tenancy. There was no response from the plaintiff. So on 16 July 1990 the defendant's solicitors D wrote to the plaintiff's solicitors asking whether the plaintiff intends to execute the tenancy agreement. Again there was no response. Finally on 16 March 1991 the defendant served a notice to the plaintiff terminating the renting of Wisma SCA with effect from 15 April 1991. On 15 April 1991 the defendant vacated the premises.

E

[6] In this writ action, the plaintiff claims against the defendant for an alleged breach of a tenancy agreement between the parties for the rental of the second and third floors of Wisma SCA. The plaintiff, in the present case, takes the position that although the parties never entered into a formal F tenancy agreement, nevertheless, there exists a written tenancy agreement between the plaintiff and the defendant. From the plaintiff's standpoint, the tenancy was for a period of one year from 1 April 1990 until 31 March 1991. The tenancy agreement, the plaintiff alleges, was constituted by three letters which the plaintiff wrote to the defendant, namely, the letters dated G 12 February 1988, 19 August 1989 and 23 February 1990. I have already alluded to these letters earlier in this judgment.

[7] The plaintiff is claiming:

H (a) for an account of the gross monthly revenue;

(b) for damage to the fixtures and fittings;

(c) for cost of reinstatement of the premises;

I (d) for full rental for the whole month of April 1991; and

(e) for loss of income by inability to rent out the premises.

[8] The defendant has a counterclaim against the plaintiff for a sum of RM57,000 as a return of the deposit paid. The basis of the counterclaim is

that the defendant did not breach the agreement it had with the plaintiff and is therefore entitled to the return of the deposit.

[9] I have dismissed the plaintiff's claim with costs. I have also dismissed the defendant's counterclaim with costs.

[10] I shall now explain my grounds.

THE PLAINTIFF'S CLAIM

[11] The defendant in their defence raises several issues. But I propose to deal only with one issue: whether in the light of the power of attorney the plaintiff can bring this action in its name instead of in the name of the registered owners. I have dismissed the plaintiff's claim solely on this ground.

[12] The registered proprietors of Wisma SCA are the following five individuals:

(1) Low Kok Tin;

(2) Low Kok Tee;

(3) Low Kok Tuan;

(4) Low Kok Yau; and

(5) Low Kok Loon.

[13] These five registered owners granted the plaintiff a power of attorney dated 5 May 1984. The relevant provisions of the power of attorney are the following:

> 15.1 To sign, deliver and execute unto the tenant their successors in title, personal representatives and assign a good valid and effectual tenancy agreement of the portions or parcels of the Complex (Wisma SCA) lot to the said tenants with such terms covenants and conditions as are set out in the tenancy agreement.
>
> 15.2 To demand and receive from the said tenants or their successors in title, personal representatives and assigns all sums due and payable by the said tenants and to give a good receipt for the same.

[14] In my judgment, this power of attorney does not empower the plaintiff to commence this action in its own name. In fact this is admitted by the plaintiff itself; for, their main witness, Encik Low Twan Kin (PW1), a director of the plaintiff company, in cross-examination, conceded:

Q: Would you agree that the power of attorney does not give the plaintiff the power to file any suit with regards to the tenancy in the plaintiff's name?

A: No, it does not.

[15] Since it is admitted — and I would say correctly — by PW1 that the plaintiff has no power under the power of attorney to file the present writ action under its own name, this means the writ action should have been filed under the name of the five registered owners. Since in the present case the plaintiff has filed the writ action under its name, therefore, it has done something which it is not empower to do so under the PA. Hence, it has no locus standi and the writ action must be dismissed with costs.

[16] Learned counsel for the plaintiff, Encik Balwinder Singh, in his written submission, however, argues that this issue is now res judicata because the issue had already been raised by the defendant's counsel as a preliminary objection before Hashim Yusof J when this case was first heard before the learned judge on 21 October 1998. It was raised before the trial commenced, and the learned judge, after hearing submissions, had dismissed the preliminary objection. Learned counsel refers to *Hartecon JV Sdn Bhd v Hartela Contractors Ltd* [1996] 2 MLJ 57 where the Court of Appeal held that where once a judge makes a ruling, substantive or procedural, final or interlocutory, it must be adhered to and may not be reopened.

[17] The issue raised in the preliminary objection before Hashim Yusof J then was this:

> Can person who is not a registered proprietor of premises — let out or take action?

[18] After hearing submissions, Hashim Yusof J dismissed the preliminary objection and directed the trial to proceed. This is what the learned judge said:

> Setelah mendengar hujahan kedua-dua belah pihak mahkamah menolak bantahan awal peguam defendan dengan kos dalam kausa. Kes perlu diteruskan perbicaraan.

[19] It will be observed that the learned judge in dismissing the preliminary objection did not give any grounds. The learned judge did not explain whether his decision was based on substantive law arguments or whether it was based on procedural law arguments. It is important to observe from the notes of the proceedings before Hashim Yusof J that, besides issues of substantive law, issues of procedural law were also raised by learned counsel for the plaintiff in opposing the preliminary objection of the defence then. For example, it was submitted by counsel for the plaintiff then that the preliminary objection should have been raised by way of an O 18 r 19 application; that the defendant was late in raising the preliminary objection; that the defence should have asked for further and better particulars. It was

also argued by counsel for the plaintiff in opposing the preliminary objection before Hashim Yusof J — and this, to my mind, is a very pertinent observation for the purpose of the issue of res judicata — that the defendant:

> Should go for trial and established the facts first.

[20] Since the learned judge did not give his ground (or grounds) for dismissing the preliminary objection, we do not know why he had dismissed the same. He might very well have been persuaded by any one (or more) of the above procedural law arguments by counsel. For example, the learned judge could have been persuaded by the argument that the defence '[s]*hould go for trial and establish the facts first*'. On the hypothesis that this was the basis for the learned judge's rejection of the preliminary objection, it is now perfectly in order (and, indeed, would be consistent with the learned judge's ruling and direction) for the defence to raise the same issue again, now that the trial had concluded and the full facts of the case have been established. Although notwithstanding the fact that the learned judge, after dismissing the preliminary objection, did immediately say:

> Kes perlu diteruskan perbicaraan.

[21] It is, to my mind, still speculative on my part to say that the acceptance of the 'go for trial first' argument *was* the reason for his rejection of the preliminary objection, yet at the same time, it would also be *speculative* on my part to *rule out* the possibility of the learned judge accepting this ('go for trial first') argument as his basis for dismissing the preliminary objection. Since several procedural issues were raised before the learned judge and he, in dismissing the preliminary objection, did not give his reason, I am, therefore, not inclined to accept the argument of Encik Balwinder that the ruling of Hashim Yusof J is now res judicata vis-à-vis the issue that is now raised by Encik Gopal Sreenevasan, learned counsel for the defendant.

[22] Now, Encik Balwinder also submits in the alternative that the plaintiff can legally file the writ in its name because, counsel contends, it is the plaintiff who had tenanted out the premises to the defendant — not the five registered owners. He submits that, in law, the landlord need not necessarily be the registered owner, citing *J Selvam & Anor v S Mehta & Anor v S Mehta & Anor* [1981] 2 MLJ 45. I accept that in law the landlord need not have to be the registered proprietor and that in the present case legally the plaintiff can be the landlord in respect of the tenancy of the premises. And if the plaintiff was the landlord of the tenancy with the defendant (as opposed to merely being the agent of the registered owners of Wisma SCA) then, of course, the plaintiff has the right to bring this action in their own name (instead of in the name of the five registered proprietors). However, in the

present case, was the plaintiff the landlord in the tenancy with the defendant? When the plaintiff negotiated with the defendant, were they negotiating in their in own right; or were they negotiating as the agent or attorney of the registered proprietors? On the evidence it would appear to me that the plaintiff was negotiating with the defendant not in their own right as the purported owner and the prospective landlord of Wisma SCA but as the agent or attorney of the registered owners. It is significant to note that the draft tenancy agreement that the plaintiff forwarded to the defendant vide their letter dated 27 June 1989 (B at pp 38–60) states that the tenancy agreement was between the five registered owners (instead of the plaintiff) and the defendant. This is a strong evidence to show that the plaintiff did not have in mind to be the landlord in the proposed tenancy. The plaintiff was constantly conscious of the existence of the power of attorney and, indeed, had even exhibited the power attorney as evidence at the trial.

[23] As I have dismissed the plaintiff's claim on this ground, I do not think that it is necessary for me to touch on the other issues raised by the defence.

THE DEFENDANT'S COUNTERCLAIM

[24] In the light of the ground for my dismissing the plaintiff's claim, the defendant's counterclaim has became untenable and must necessarily be also dismissed. Since the defendant has taken the position that in law the landlord-tenant relationship existed only between the registered owner (not the plaintiff) and the defendant, therefore, consistent with this position taken the defendant must sue the registered owners (and not the plaintiff) for the return of the deposit.

Plaintiff's claim and defendant's counterclaim dismissed with costs.

Reported by Sally Kee